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# BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

## In the Supreme Court of the United States

OCTOBER TERM, 1904.

No. 67.

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THE AMERICAN EXPRESS COMPANY AND R. M. COFFIN, PLAINTIFFS IN ERROR,

*v.*

THE STATE OF IOWA.

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ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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(18,985.)

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## STATEMENT OF FACTS.

On the 31st day of March, 1900, an information was filed in the office of A. W. Guernsey, justice of the peace of Tama county, Iowa, charging the plaintiffs in error with keeping intoxicating liquors in said county with intent to sell the same in violation of law. Upon the filing of such information the justice of the peace issued a warrant to one W. T. Hollen, a constable of said county, directing him to search the premises described in the information and to seize all liquors with the vessels containing the same found therein, and to keep the same until final action thereon by the court.

On the 2d day of April, 1900, the constable returned said warrant into court, his return thereon showing that he had searched the premises described therein and had found and seized four packages of intoxicating liquors in the office of the American Express Company, in Tama, Tama county, Iowa, and in the building occupied by R. M. Coffin as a drug store, and as the office of said American Express Company; and that he then held said liquor subject to the further order of the court.

Notice of such seizure was given by the justice of the peace to plaintiffs in error, and they were duly summoned to appear before said justice on the 9th day of April, 1900, and show cause why the liquors and vessels seized under said warrant should not be forfeited, condemned and destroyed under the laws of the state of Iowa.

The cause came on for hearing before the justice of the peace on the 9th day of April, 1900, C. B. Bradshaw,

Esq., appearing as attorney for the defendant in error, and Willett & Huber, Esqs., appearing as attorneys for plaintiffs in error. The plaintiffs in error, as defendants in said action, filed their answer therein, setting forth among other things that on or about the 29th day of March, 1900, the American Express Company, as a common carrier, received from John Collum & Company, consignors at the city of Rock Island, in the state of Illinois, four boxes said to contain merchandise, respectively consigned to W. E Pauley, George Everhart, Link Hartsock and Bert Anderson at Tama, Iowa, and that said packages and each of the same were shipped by the consignor C. O. D. to the consignee. That said packages were transported by The American Express Company from Rock Island, Illinois, to Tama, Iowa, where they arrived on the 31st day of March, 1900, where they were received by the said R. M. Coffin, as agent of the Express Company, and by him were taken to his place of business in his drug store in Tama, which is the local office of The American Express Company at that place.

It is further alleged in said answer that said packages and each of them were still in transit in the possession of the Express Company and their agent, R. M. Coffin, acting for said company, at their office in Tama, Iowa, and had never been delivered to consignees or either of them at the time they were seized by the officer in the proceeding before the justice of the peace. That the charge against each of said packages is the sum of three dollars, which must be collected by the Express Company before the same can be delivered.

Under these facts The American Express Company and R. M. Coffin asked that the liquor seized by the constable be ordered returned.

Upon the trial of the proceeding before the justice of the peace, the following agreed statement of facts, which was filed in the case, was entered into by the parties:

It is hereby stipulated by the parties to the above entitled cause:

1st. That the defendant, the American Express Company, is a foreign corporation as alleged in defendant's answer.

2d. That said defendant express company has not nor has it at any time had or held a permit or other authority to sell intoxicating liquors in Tama county, Iowa.

3d. That the defendant, R. M. Coffin, is a registered pharmacist and holds a permit to sell intoxicating liquors for the purposes authorized by the laws of Iowa, but that he makes no claim that such permit authorizes any delivery of intoxicating liquors by him as agent of said express company which may be received by him as the agent of his company, and consigned to parties who may call for the same at the office of said company, nor is the delivery of such liquors by him for the said express company in any wise conducted under the regulations and laws prescribed by the state of Iowa for the sale of intoxicating liquors by him as a registered pharmacist and permit holder.

4th. That at the time the packages described in defendants' answer, which are the same packages seized under the warrant of seizure in this cause, were received for transportation by said express company, neither the defendant company nor its agents or employes knew or had any knowledge that the said packages contained intoxicating liquors, nor did said express company, its employes or either of the other defendants, Coffin and Crossman, know or have any knowledge of the actual contents of said packages seized herein until after the seizure thereof.

5th. It is conceded that said packages and each of them do contain intoxicating liquors of not less than one quart each, and that such liquors are in the original packages in which they were delivered to the defendant express com-

pany as a common carrier in the state of Illinois for transportation to Tama, Iowa.

6th. That the charge of three dollars on each package, mentioned in defendants' answer, is no part of the charges for transportation and no part of the compensation of said defendant express company for transporting the same, and that the said sum of three dollars is the purchase price of the goods contained in each package respectively, and that said express company is bound under its contract to collect for the shipper of said packages the sum of three dollars on each package before delivering the same to the consignee and to transmit to said shipper the sum of three dollars on each package.

7th. That the place of delivery of said packages to consignees is at the office of the said American Express Company in Tama, Tama county, Iowa, of which office the defendant, R. M. Coffin, is in charge as agent, and at the time of the seizure herein none of said packages had been delivered to the consignees or either of them. That said packages and each of them were shipped by consignors to consignees on their orders, given to the traveling agent of consignors at Tama, Iowa, and by him sent in to consignors subject to their approval and shipment thereunder.

8th. That in case the hearing of this cause should be on demurrer of plaintiffs to defendant's answer, each of the above admitted facts shall be considered in connection with the answer as fully and have the same effect in law as if alleged in said answer or made a part thereof.

C. B. BRADSHAW,
Attorney for Plaintiff.
WILLETT & HUBER,
Attorneys for Defendant.

The proceedings were tried upon said stipulation and the justice of the peace found that the packages of liquor seized under the warrant issued by him were kept by the plaintiffs in error for the purpose of being sold in violation of the laws of Iowa, and entered judgment that the same be forfeited and destroyed, to which judgment and order the plaintiffs in error excepted and gave notice of an appeal

to the district court of said county; and thereafter, and on the 16th day of April, 1900, plaintiffs in error perfected their appeal to the district court of Tama county, Iowa, by filing their bond as required by law.

Thereafter the plaintiffs in error filed an amendment to their answer in the proceeding before the justice of the peace, averring that under the facts in the case, as shown by the pleadings and stipulation of facts, a federal question arises under the constitution of the United States and the laws of congress, namely: That the plaintiffs in error were engaged in interstate commerce as common carriers, and that the state of Iowa has no power over goods in transit from one state to another, and under such interstate commerce rights the plaintiffs in error insisted that the liquors and packages in controversy be returned.

On the 16th day of January, 1901, the cause was tried and submitted in the district court of Iowa, without the intervention of a jury, and the judge of said court found that said liquors were wrongfully seized and ordered that they be returned to the Express Company and that the state of Iowa pay the costs of the prosecution, to which order and judgment the state excepted; and on the 23d day of March, 1901, perfected its appeal from said judgment to the supreme court of Iowa.

Thereafter on the 30th day of October, 1902, the cause came on for hearing in the supreme court of Iowa, and the judgment and order of the district court were reversed, the cause remanded for further proceeding, and a judgment entered against the plaintiffs in error for the costs of the appeal, the supreme court of Iowa holding in the opinion handed down by it that the intoxicating liquors

were kept by the plaintiffs in error with intent to be sold in violation of the laws of the state, and that they were rightfully seized and should have been destroyed.

Thereafter, and on the 4th day of May, 1903, plaintiffs in error sued out their writ of error to the supreme court of Iowa, and the cause is now before this court for hearing upon such writ.

## BRIEF.

### I.

Thirteen errors are assigned by plaintiffs in error, which really present one question only for determination by this court. That question may be stated as follows:

*Does the law of Iowa, prohibiting the sale of intoxicating liquors, apply to a shipment from the state of Illinois, after the arrival of such intoxicating liquors at their destination in the state of Iowa and before they are delivered to the consignees thereof by the common carrier, where such liquors are shipped C. O. D. to the consignee, and it is the duty of the carrier to collect the purchase price thereof before delivering the same?*

It is the contention of the plaintiffs in error that intoxicating liquors shipped C. O. D. from Illinois to the state of Iowa are merchandise in transit and protected by the interstate commerce clause until the same are delivered by the common carrier to the consignee; and are not subject to the laws of Iowa forbidding their sale within the state.

It is the contention of the defendant in error:

(1) Where merchandise is delivered by a consignor to a common carrier to be transported by such common carrier to the consignee, and the common carrier is required to collect from the consignee the purchase price of such merchandise before delivering the same to him, the sale is made at the place where the purchase price is paid and the merchandise delivered to the consignee.

(2) That intoxicating liquors which are shipped C. O. D. from another state into the state of Iowa cease to be protected by the interstate commerce clause upon arrival at their destination, and that under the act of congress of August 8, 1890, known as the Wilson bill, they at once upon arrival at their destination become subject to the operation and effect of the law of the state of Iowa.

(3) That no federal question is involved which gives this court jurisdiction to hear and determine this cause, for the reason that the decision of the supreme court of Iowa does not deny the authority of congress to regulate commerce among the several states.

II.

The ownership and possession of merchandise which is shipped C. O. D. remain in the consignor until it is delivered to the consignee by the common carrier upon payment of the purchase price, and the sale is made at the place of delivery, except where the consignee expressly designates the common carrier as his agent to transport and deliver such merchandise, or where the acts of the parties show that the consignor intended to part with his property and to trans-

fer the title and possession thereof to the consignee at the time of delivery to the common carrier.

*United States v. Shriver*, 23 Fed. Rep., 134;
*United States v. Cline*, 26 Fed. Rep., 515;
*McElvee v. Met. Lumber Co.*, 69 Fed. Rep., 302;
*McNeil v. Brawn*, 53 N. J. Law, 617;
*Thompson v. Cincinnati, W. & Z. R. Co.*, 1 Bond C. C., 152;
*Hooper v. C. & N. R. Co*, 27 Wis., 81;
*Braddock Glass Co. v. Irwin*, 153 Pa. St., 440;
*Millheiser v. Erdman*, 98 N. C., 292;
*Stone v. Perry*, 60 Me., 48;
*Moakes v. Nicholson*, 19 C. B. N. S., 290;
*Hirshorn v. Canney*, 98 Mass., 149;
*Daugherty v. Fowler*, 44 Kan., 628;
*Suit v. Woodhall*, 13 Mass., 391;
*Wasserboehr, v. Poulier*, 84 Me., 165;
*Lane v. Chadwick*, 146 Mass., 68;
Benjamin on Sales (1883), Sec. 1040.
*State v. O'Neil*, 58 Vt., 140;
*Brewing Co. v. DeFrance*, 91 Iowa, 108;
*State v. U. S. Ex. Co.*, 70 Iowa, 271;
The Francis, 13 U. S., 183;
Mechem on Sales, Secs. 494, 502, 740.

III.

The place of the sale of goods or merchandise is the place of delivery; that is, where the sale is completed by delivery.

*Dow v. Gould*, etc., Silver Min Co., 31 Calif., 629;
*Mead v. Dayton*, 28 Conn., 39;

*Lewis v. McCabe*, 49 Conn., 155 (44 Am. Rept., 217);
*Weil v. Golding*, 141 Mass., 364.

IV.

Under the act of congress of August 8, 1890, all fermented, distilled or other intoxicating liquors transported into any state or remaining therein for use, consumption, sale or storage, are, upon arrival in such state, subject to the operation and effect of the laws of the state to which they are shipped, and subject to the police powers of such state, to the same extent as domestic property therein, whether such liquors are transported in original packages or otherwise.

26 U. S. Stat., 313, c. 728;
*In re Rahrer*, 140 U. S., 545;
*Rhodes v. Iowa*, 170 U. S., 412.

V.

Where merchandise is shipped C. O. D., the liability of the carrier ceases and that of a warehouseman attaches at the time of the arrival of such merchandise at the place of its destination.

*Weed v. Barney*, 45 N. Y., 344 (6 Am. Rept., 96);
*Gilson v. Am. Merchants Union Ex. Co.*, 1 Hun. (N. Y.), 387;
*Marshall v. Am. Ex. Co.*, 7 Wis., 1 (73 Am. Dec., 381);
*Pac. Ex. Co. v. Wallace*, 60 Ark., 100 (61 Am. & Eng. R. Cases, 170);
Schouler on Bailments and Carriers (2d ed.), Sec. 507;

VI.

There is no duty or obligation arising out of the nature of a carrier's business which requires such carrier to collect payment of the price of goods transported by it as a condition precedent to their delivery. Such obligation arises, if at all, by special contract, express or implied.

*Cox v. Columbus, etc., R. Co.*, 91 Ala., 392 (49 Am. & Eng. R. Cases, 112);
*Union R. Co. v. Riegel*, 73 Pa. St., 72.

VII.

The statute of Iowa under which the liquors were seized and condemned is set out upon pages 19 and 20 of the transcript of the record.

VIII.

In the seventh paragraph of the agreed statement of facts, it is expressly stipulated that the packages of intoxicating liquors in question were to be delivered to the consignees at the office of the American Express Company in Tama, Tama county, Iowa. (Transcript of record, p. 5.)

ARGUMENT.

I.

In the case at bar the intoxicating liquors were by the consignor delivered to the American Express company, a common carrier, at Rock Island, in the state of Illinois, to be transported by such carrier to the city of Tama in the state of Iowa, and then delivered to the consignees upon the condition that such consignees pay the purchase price thereof to the express company at the time of delivery. They were shipped C. O. D. which, as is generally and

ordinarily understood, means that the carrier shall collect the purchase price on delivery. The effect of such a shipment was that no rightful delivery of the goods could be made except upon the payment of the purchase price, and the intent of the consignor clearly appears to have been that he should retain the title to the liquors so shipped until the purchase price was paid and a delivery thereof made by the express company as his agent.

It is the contention of the defendant in error that under such a contract of sale, the ownership and possession of the intoxicating liquors remained in the consignor until there was a delivery to the consignee by the common carrier, and that the completed sale of such liquors could only be made at the place where the same were delivered to the consignees.

While the question has never been directly before this court, there are many cases where it has arisen in inferior courts and in the courts of last resort in the several states, and the weight of authority is that the title to merchandise shipped C. O. D., and which is not to be delivered by the common carrier until the purchase price is paid, remains in the consignor until the purchase price is paid and a delivery thereof made by the common carrier as agent of the consignor.

In *United States v. Cline*, 26 Fed. Rep., 515, 516, it is said:

"If a vendor delivers an article ordered to a common carrier marked C. O. D., and directed to an intended purchaser, the contract of sale is completed at the place of delivery to the purchaser on the payment of the price, as the common carrier is the agent of the vendor for the purpose expressed, and the ownership of the property set apart for the purchaser does not pass to him until he pays the price."

In *McElwee v. Met. Lumber Co.*, 69 Fed. Rep., 305, it is said:

"Undoubtedly the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery. The Venus, 8 Cranch, 275; *Sneathen v. Grubbs*, 88 Pa. St., 147; Benjamin on Sales, Secs. 325, 377; *Com. v. Greenfield*, 121 Mass., 40."

In *Wasserboehr v. Boulier*, 84 Me., 167, it is said:

"It was in accordance with these general principles that the courts have held that the price of liquors sold and delivered in a state where such sale is legal, and nothing remains to be done by the vendor to complete the transaction, can be recovered in another state where such sale would be illegal. *Torrey v. Corliss*, 33 Me., 333; *Banchor v. Cilley*, 38 Me., 553; *Orcutt v. Nelson*, 1 Gray, 536; *McIntyre v. Parks*, 3 Metc., 207; *Milliken v. Pratt*, 125 Mass., 374; *Scudder v. Union Nat. Bank*, 91 U. S., 406. Though it is otherwise if the contract contains any ingredient or participation on the part of the original vendor that the goods shall be illegally sold, or that he shall do any act beyond the mere sale to assist or facilitate the illegal act, or to aid the purchaser in his unlawful design in the subsequent unlawful disposition of the goods; *or if the goods are to be delivered in a place where the sale is prohibited. Smith v. Godfrey*, 28 N. H., 379; *Banchor v. Mansel*, 47 Me., 58; *Hill v. Spear*, 50 N. H., 253; *Lindsey v. Stone*, 123 Mass., 332; *Wilson v. Stratton*, 47 Me., 120, 127."

In the case last referred to it was held that although the intoxicating liquors in question were delivered to a common carrier at Boston, Mass., the sale was made in the state of Maine, as the delivery was made in that state, and recovery was denied under its laws.

In *McNeil v. Brawn*, 53 N. J. Law, 620, it is said:

"It is sometimes stated as a general rule that delivery to the carrier is delivery to the consignee, and that the goods

are to be carried to their destination at his risk; but an examination of the decisions to that effect will show that this doctrine prevails only where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the undertaking to ship was collateral to the contract of sale, as in *Tregelles v. Sewell*, 7 Hurlst. & N., 573. It will also be found that the rule uniformly adopted in the line of decisions is that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract, and the intention of the parties. In *Dunlop v. Lambert*, Lord Cottonham said: 'When the party undertaking to consign undertakes to deliver at a particular place, the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor.' In *Calcutta Co. v. DeMattos*, Mr. Justice Blackburn said: 'There is no rule of law to prevent the parties from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them on terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether they are delivered at the port of destination or not, this intention is effectual. * * * If the parties intend that the vendor shall not only deliver them to the carrier, but also undertake that they shall be actually delivered at their destination and express such intention, this is also effectual. In such case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination.' "

In *Moakes v. Nickolson*, 19 C. B. N. S., 290, it was held where coals were sold at Hull and shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in hands of seller's agent in London, that no property passed to the buyer until the condition was fulfilled, and that the price being unpaid the seller was entitled to intercept delivery.

In *Braddock Glass Co. v. Irwin & Co.*, 153 Pa. St., 443, the supreme court of Pennsylvania, in passing upon the correctness of certain instructions given by the trial court to the jury, said:

"This instruction ignores the recognized principle that where goods are carried by the vendor to a certain place and there delivered to the vendee, the carrier is the agent of the former and not the latter, and that the vendor is responsible for the negligence or misconduct of his agent. *McNeil v. Bawn*, 53 N. J. Law, 617; *Sweathen v. Grubbs*, 88 P. St., 147; *Scott v. Wells*, 6 W. & S., 357; Benjamin on Sales (1883), Sec. 1040."

Mr. Benjamin, in his work on sales, section 1040 (1883) says:

"If, however, the vender should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of carriage, the carrier is the vendor's agent."

The case of *Dunlop v. Lambert*, 6 Cl. & F., 600, being cited in support of the text.

In *Stone v. Perry*, 60 Me., 50, it is said:

"If goods are sold conditionally and delivery made according to the custom of trade before conditions are complied with, in expectation of compliance, the delivery is also conditional, and no title vests in the purchaser until performance of the condition."

The delivery of the liquors in question to the plaintiffs in error at Rock Island, Illinois, did not make a complete sale, as no delivery thereof was to be made by the carrier to the consignees until the purchase price was paid at the place of destination. The carrier was made the agent of the consignor for the purpose of completing the sale by

delivering the liquors to the consignees at Tama, Iowa, when they paid the purchase price thereof at the place of delivery. The case clearly falls within the principle of law laid down by the authorities cited, and the sale was to to be made by delivery of the liquors at Tama, Iowa, and the title and possession thereof remained in the consignor until such delivery was made.

In *Lane v. Chadwick*, 146 Mass., 68, the plaintiff ordered goods from a wholesale druggist in Boston to be shipped to her by express C. O. D. The goods were so shipped, nailed up in boxes, and accompanied by an itemized bill. The defendant, an express messenger, took the goods to plaintiff's store and demanded the amount of the bill with express charges on delivery of the boxes. The plaintiff refused to pay until she had had an opportunity to examine the contents of the boxes and compare the contents with the bill. The defendant refused to permit such an examination and took the boxes away. Subsequently the plaintiff procured a writ of replevin and went to the defendant with an officer and in his presence tendered to the defendant the amount of the bill and express charges, and showing the bill of items demanded that those specific goods be delivered to her. The defendant replied that he knew nothing about the particular goods, and could not be responsible for the contents of the boxes but said he was ready to deliver the boxes. The plaintiff refused to accept the boxes without knowledge of their contents, and the writ of replevin was served. The goods named in the itemized bill were all in the boxes. The cause was tried to the superior court without a jury, and plaintiff brought the case to the supreme judicial court of Massachusetts

upon exceptions. Chief Justice Morton, in passing upon the question, said:

"The delivery to the carrier was not a delivery to the plaintiff. He was not her agent but the agent of the consignor: *Merchants Nat. Bank v. Bangs*, 102 Mass., 291. Until he delivered the goods to her, no title or right of possession would pass to her, and it is immaterial whether he rightfully or wrongfully refused to make the delivery. At the time she replevied the goods she had no title or right of possession."

In the case of the *State v. O'Neil*, 58 Vt., 140, intoxicating liquors were delivered to the National Express Company in the state of New York, to be by it transported to the state of Vermont and there delivered to the consignees upon the payment of the purchase price and cost of transportation; that is, the liquors were shipped by the consignor to the consignee C. O. D., and the express company was required to collect the purchase price before delivery. Upon their arrival in the state of Vermont, and while in the possession of the express company, they were seized under the Vermont law upon the ground that they were held by the express company for the purpose of being sold in violation of law. The agent of the express company in Vermont appeared in the proceedings and claimed the liquors upon the ground that they were not held by him with intent to be sold in violation of law. The case was tried upon the issue so raised, the liquors were ordered destroyed, and an appeal from such judgment was taken to the supreme court of the state.

The case, therefore, is in almost every particular identical with the one at bar; and while it is not conclusive as an authority in this court, an excerpt of the opinion is given because of the apparent soundness of the principles

of law therein enunciated. Mr. Chief Justice Royce, in delivering the opinion of the court, said:

"If the purchase and sale of the liquors was fully completed in the state of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of this state has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the county court upon the question of the offense were correct.

"The liquors were ordered by residents of Vermont from dealers doing business in the state of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill, or invoice for collection. The shipment was in each instance, which it is necessary here to consider, 'C. O. D.', and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C, O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

"Whether or not, and when the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by Morton J., in *Mason v. Thompson*, 18 Pick., 305:

"'The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point; and if anything remains to

be done before either assents, it may be an inchoate contract, but is not a perfect sale.'

"The authorities seem to be uniform upon this point, and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, Secs. 311, 319, note C: 'When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession.'

"In cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by the company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely: Payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forward them to, or make them deliverable upon the order of his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to

part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state."

In *Wagner v. Hallack*, 3 Colo., 184, it is said:

"The goods were shipped to the agent of plaintiffs and marked C. O. D. These initials have a well known commercial meaning, and show clearly that the plaintiffs did not intend to give credit to anyone. Their purpose is manifest to retain control of the goods and thereby secure themselves against the default of either Heenan or the defendants. The delivery to the carrier, therefore, was not a delivery to the buyer, and the *jus disponendi* remained in the vendor."

Mr. Benjamin in his work on Sales states the general principle as follows:

"Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but the captain as bailee for delivery to the person indicated by the bill of lading as the one to whom they are to be carried. This principle runs through all the cases and is clearly enunciated by Park, B., in *Wait v. Baker;* by Byles, J., in *Moakes v. Nicholson;* by Bramwell & Cleasby, B. B., in *Gabaron v. Kreeft;* and by Cotton, L. J., in *Mirabita v. Imperial Ottoman Bank.*"

In the case at bar the goods were intrusted to a carrier to be transported by him to the place of residence of the consignee, and there to be presented to such consignee for acceptance, and if he accepted them and paid the purhcase price thereof, they were, by such carrier, as the agent of the consignor, to be delivered to the consignee. It is diffi-

cult to conceive of a case where a seller of goods could more positively and unequivocally express his intention not to part with the title or possession until the purchase price was paid.

As is said in the Vermont case, such a transaction is not distinguishable in principle from that of a vendor who sends his clerk to deliver goods to a purchaser, with instructions not to deliver them except upon the payment of the price. In such a case there could be no question that the seller did not part with the title of the goods so long as they remained undelivered in the possession of his clerk. The clerk, in the case supposed, would be his agent to deliver the goods when certain conditions were performed by the purchaser. In the case at bar the plaintiff in error was designated by the consignor as his agent to deliver the intoxicating liquors to the consignee upon the performance of a specified condition on the part of the consignee, viz: the payment of the purchase price to the agent before delivery.

It must, therefore, as it seems to us, be held that the sale of the intoxicating liquors in question was not consummated or completed in the state of Illinois, and that the American Express Company, as the agent of the consignor, held the same in the city of Tama in the state of Iowa with the intention of selling the same to the consignees in violation of the Iowa statute.

In reaching the conclusion above stated, based in a large degree upon the authorities referred to, we do not wish to be understood as saying that the cases upon this question are uniform. There is a conflict in the decisions of the courts of last resort of the states, and several of them have

announced a principle of law governing transactions of this character which is opposed to the conclusions here reached, notably Alabama, Arkansas, Kentucky and West Virginia, but the rule announced by the authorities cited appears to us to be the sounder and more logical principle of law, and to be in harmony with the well recognized principles governing the sale of property.

II.

It may be fairly stated in general terms, that the place of the sale of goods or merchandise is the place of delivery, that is, where the sale is completed by delivery.

As bearing upon this question the attention of the court is called to the case of *Thompson & Foreman v. Cincinnati, W., etc., R. Co.*, 1 Bond, 152. In that case the plaintiffs were manufacturers of railroad iron in Wales, and contracted to sell the defendant 9,000 tons at $38 a ton, 2,500 tons of which were to be shipped to New Orleans on or before the 15th day of September, 1852, 2,500 tons by the 1st of January following, and the remaining 4,000 tons to be shipped to New York by the 1st of January following. The whole of the 9,000 tons of iron was shipped by the plaintiff, and 590 tons were lost at sea. The remaining tons were received by the defendant and paid for according to contract, except a balance of $24,827.25. Action was brought against the defendant for the whole of the 9,000 tons at the contract price, and in the same action they sought to recover the $24,827.25 unpaid upon iron delivered. In passing upon the rights of the plaintiffs to recover, the court said:

"It seems clear, taking the whole contract together, that the plaintiffs were bound to deliver the iron at the

times and places mentioned, and that there was no obligation to pay until and unless it was delivered. Indeed it is a part of the contract that defendant shall make payment for the iron as the same is delivered, implying that the delivery was a condition precedent to the obligation to pay. * * * If the contract is for the delivery of the iron, it follows that the plaintiff is liable for damages sustained by defendant for the non-delivery. The risk of the transportation was on the plaintiff."

III.

It may also be stated as a general principle of law that where merchandise is shipped C. O. D., the liability of the carrier ceases, and that of a warehouseman attaches, at the time of the arrival of such merchandise at the place of its destination. When, therefore, the liquor in question arrived at the office of the American Express Company in Tama, Iowa, the duty of that company as a common carrier had been fully performed, and its liability as a carrier of goods ceased. It then held the liquors as a warehouseman and in storage to be delivered to the consignees upon the condition imposed by the consignor, viz: The payment of the purchase price thereof. It is no part of the duty of a common carrier to collect and remit the purchase price of goods transported by such carrier.

By requiring the purchase price to be paid before delivery of the liquors in question, the consignor reserved the *jus disponendi* thereof, and no title could pass to the consignee except upon payment of the purchase price and the delivery by the express company. Upon such delivery, therefore, the sale of the intoxicating liquors would be made in the state of Iowa, and not in the state of Illinois.

It therefore logically follows that the liquors were in possession of the plaintiffs in error with intent to be sold in violation of the laws of Iowa, and were subject to seizure and destruction under the laws of the state, unless protected by the interstate commerce clause of the constitution, and the laws of congress on that subject.

IV.

*Were the liquors in question, after their arrival at their destination in the city of Tama, in the state of Iowa, goods which were being transported from one state to another and protected by the interstate commerce clause?*

It is conceded by defendant in error, that, except for the act of congress of August 8, 1890, the liquors in question, so long as they remained in the original package in the possession of the common carrier at their place of destination, would be merchandise in the course of transportation and protected from the operation of the laws of the state of Iowa by the interstate commerce clause. That question was settled in *Leisy v. Hardin*, 135 U. S., 100, and the doctrine therein announced has since been adhered to by this court.

In *Rhodes v. Iowa*, 170 U. S., 412, this court held that intoxicating liquors shipped from Illinois to the state of Iowa were not within the jurisdiction of the laws of Iowa until they reached their destination in the latter state; that is, that the law of Iowa could not constitutionally attach to such goods the moment they arrived at the state line and while they were being transported under the interstate commerce law to their place of destination. In determining the question then presented to the court, it said:

"We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether, if the act of congress had submitted the right to make interstate commerce shipments to state control, it would be repugnant to the constitution."

The act of congress of August 8, 1890, provides:

"All fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This enactment of congress followed the decision of this court in the case of *Leisy v. Hardin* and, as a matter of common knowledge, was enacted for the purpose of preventing the shipment of intoxicating liquors in original packages from one state into another to be there sold in violation of law. Under the decision in the Leisy case, intoxicating liquors could be shipped from one state into another and sold by the consignee in violation of the state law in the original packages in which they were shipped, and such liquors did not become a part of the common property within the state until sold by the consignee. In deciding the question in the Leisy case, the court said:

"Under our decision in *Bowman v. Chicago, etc., Ry. Co., supra*, they (the plaintiffs in error) had the right to import this beer into that state, and in the view which we have

expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within that state. Up to that point of time we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure or any other action in prohibition of importation and sale by a foreign or non-resident importer. * * * "

In that case this court clearly recognized the power of congress to permit the laws of a state to attach to property imported within the state after its arrival therein and before it became a part of the common mass of property within such state. The act of congress of August 8, 1890, not only grants permission for the operation of state laws upon property imported into the state and at a time prior to its becoming a part of the mass of the property of the state, but it affirmatively declares that all fermented, distilled or other intoxicating liquors transported into any state or territory, or remaining therein for use, consumption, sale or storage, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory.

In determining the effect of the congressional enactment, this court in *In re Rahrer*, 140 U. S., 559, 560, said:

"The laws of Iowa under consideration in *Bowman v. Railway Co.*, 125 U. S., 465, and *Leisy v. Hardin*, 135 U. S., 100, were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country than this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, so long as con-

gress did not pass any law to regulate it specifically, or in such way as to allow the laws of the state to operate upon it, congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the state, or their sale upon arrival, in the form in which they were imported there from a foreign country or another state. It followed as a corollary, that when congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

"Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?"

Here again we have the recognition of the power of Congress to permit the laws of the state to attach to and affect imported goods upon their arrival within the territory of the state, and before such goods become a part of the common mass of property within the state which is subject to its laws. And in the Rahrer case it was held that the petitioner was liable to prosecution and punishment under the laws of Kansas for selling intoxicating liquors which had been shipped to him from the state of Missouri before the act of congress referred to, although he sold such liquors in the original packages in which they were received by him. That is, this court directly held that the laws of Kansas became operative and effective, under the permission given by congress in the act referred to, as to intoxicating liquors imported into the state of Kansas before they became a part of the common mass of the property within that state, notwithstanding the fact that such liquors were imported into the state of Kansas prior to the act of congress.

In *Rhodes v. Iowa* it was held that under the act of congress referred to, the laws of a state do not attach or become operative as to intoxicating liquors imported from another state or country, until such liquors arrive at the destination within the state to which the shipment is made. The liquors in question in the case at bar had arrived at their destination at the time they were seized by the state authorities. It is true they had not been sold nor had they then become a part of the common mass of property of the state, but under the act of congress referred to, they were subject to the operation and effect of the laws of Iowa enacted in the exercise of its police power, to the same extent and in the same manner as though such liquors had been produced in the state.

The act provides that such liquors shall, upon their arrival in such state or territory, be subject to the operation and effect of its laws. It is not required by the language of the act or, as it seems to us, by any construction which can be placed upon it, that the liquors must either be delivered to the consignee by the carrier or be by him sold before becoming subject to the state laws. The act itself has declared in as broad language as possible that they shall become subject to the state laws upon arrival in such state or territory. This court has held that the phrase "arrival in such state or territory" means arrival at the destination to which the shipment is made.

It then logically follows that if such liquors are, after their arrival at the destination to which shipment is made, held by the carrier or other person for sale in violation of law, they are subject under the laws of Iowa to seizure and condemnation.

The facts involved in the case at bar are precisely those which the act of congress was framed to meet. The object and purpose of the act was to make all intoxicating liquors shipped from one state into another, or from another country into a state, subject to the laws of the state the moment they arrived at their destination within that state, and to prevent the shipment and sale of intoxicating liquors in such state in violation of its laws.

It may be urged that the act of delivery by the common carrier to the consignee is a part of the transaction of interstate commerce; but as it seems to us, it is a sufficient answer to any such suggestion to say that congress has by express enactment declared intoxicating liquors in the hands of a common carrier at the place of their destination, subject to the police powers and the police regulations of the state, and that a delivery thereof to the consignee is not necessary before the state law becomes effective.

V.

*Is there a federal question involved which gives this court jurisdiction to hear and determine this case?*

The decision of the state court is based upon the proposition that, where merchandise is shipped C. O. D. from one state to another, the sale is made in the state where such merchandise is delivered by the common carrier and the purchase price paid by the consignee; and as has been shown, the same doctrine has been held in numerous other jurisdictions. The question presented to the Iowa court for determination was simply whether the sale of liquors under such circumstances was consummated in the state of Illinois or in the state of Iowa, and the determination of that question did not draw in question the validity

of a treaty or statute of, or an authority exercised under, the United States, the decision of which is against their validity, nor did it draw in question the validity of a statute of, or authority exercised under, any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, the decision of which is in favor of their validity, or where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under, the United states, the decision of which is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

The question determined by the Iowa court is one wholly within its jurisdiction, and its determination is simply the exercise of it police powers.

Beyond this no direct issue was made in either of the state courts that the liquors were merchandise which were being transported from one state to another under the interstate commerce clause of the constitution, and that question is now raised directly for the first time by the assignment of errors in this court.

The case of *O'Neil v. Vermont*, 144 U. S., 32?, is on all fours with the case at bar, and it was there held that no federal question was involved which gave this court jurisdiction to hear and determine the controversy.

In conclusion it is respectfully submitted:

(1) That the sale of the intoxicating liquors in question was not consummated or completed in the state of Illinois, but was to be made in the city of Tama in the state

of Iowa, upon the delivery thereof to the consignees and and upon payment by them of the purchase price to the common carrier.

(2) That the plaintiff in error was the agent of the consignor in completing and consummating such sale, and that when he held such liquors in his possession in Iowa with intent to complete such sale, they were held by him to be sold in violation of the laws of that state.

(3) That under the act of congress of August 8, 1890, the laws of Iowa attached and became operative upon the liquors in question upon their arrival at their destination, and while in the hands of the common carrier and before delivery to the consignees.

(4) That no federal question is involved herein which gives this court jurisdiction to hear and determine the cause.

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